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No. 85-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TREADWELL FORD, INC.,

Appellant,

v.

CLARENCE W. CAMPBELL, *et al.*,

Appellees.

On Appeal From The Supreme Court Of Alabama

REPLY MEMORANDUM

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REPLY MEMORANDUM

In their Motion to Dismiss ("Motion"), appellees—in apparent recognition of the actual practice of the Supreme Court of Alabama of resolving questions raised for the first time on rehearing—attempt to divert attention from the actual practice of the court below by arguing that "[t]he Alabama *appellate courts* are firmly committed to the rule that new questions may not be presented to them for the first time on rehearing." Motion, at 3 (emphasis added). Whatever may be the practice of the intermediate appellate court of Alabama in this regard, that court never heard or had jurisdiction over this case.[1] It is the practice of the Supreme Court of Alabama which is

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[1] Cases decided by the Alabama Court of Civil Appeals are irrelevant for an additional reason which illustrates the unbridled freedom that the Supreme Court of Alabama possesses to resolve questions raised for the first time on rehearing. If a case is within the jurisdiction of the Court of Civil Appeals, then under the Alabama Rules of Appellate Procedure, no question decided against a litigant may be taken on certiorari to the Supreme Court of Alabama unless that question has been presented to the Court of Appeals in an application for rehearing. Ala. R. App. P. 39(a).

In sharp contrast, no rule or statute of Alabama even addresses the issue of what questions can be considered by the Supreme Court of Alabama in cases coming from the circuit (trial) courts or in applications for rehearing filed after the Supreme Court of Alabama hands down a decision. Thus, the court below is similarly situated with the Supreme Court of Mississippi in this regard, *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 n.13 (1982). As appellant has demonstrated in its Jurisdictional Statement and herein, the Supreme Court of Alabama, even more clearly than the Supreme Court of Mississippi, uses that freedom routinely to reach and decide questions raised for the first time on rehearing.

at issue in this case. Of the few cases relied on by appellees, only two—decided more than fifty and seventy-five years ago—arguably support this asserted "commitment" of the court below[2] with the kind of clarity required by this Court's decisions holding that a state practice must be "strictly or regularly" followed in order for that practice to provide a basis for denying this Court's jurisdiction over substantial federal questions. *E.g.*, *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964).

The overwhelming weight of relevant authority in the court below carries a burden which appellant does not even have to carry, because it establishes an affirmative practice by the court below of deciding questions raised for the first time on rehearing. Thus, application of the recent analysis of this Court in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), regarding the practice of the Supreme Court of Mississippi, is controlling here, establishing that this case is within this Court's appellate jurisdiction. Indeed, appellees, Motion, at 17 (emphasis added), virtually concede that *Hathorn* is controlling in the case at bar, stating that *Hathorn* "and like cases to the contrary notwithstanding . . . this Court *should* refrain" from taking jurisdiction over this case. Appellees fail to appreciate that if the federal questions presented here were properly presented to the Supreme Court of Alabama, and if they are substantial—a point which appellees expressly concede, Motion, at 18, this Court has obligatory jurisdiction over this case.

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[2] *Cooper* v. *State*, 226 Ala. 288, 147 So. 432 (1933); *State ex rel. Sigsbee* v. *City of Birmingham*, 160 Ala. 196, 48 So. 843 (1908).

I

Presentation of the Federal Constitutional Challenge to 12-22-72, *Code of Alabama* (1975)

Appellees, Motion, at 6-7, attempt in various ways to distinguish the seventeen cases in which the court below has entertained statutory and constitutional issues regarding § 12-22-72. Appellees' primary submission appears to be that in those seventeen other cases, "the parties were arguably uncertain as to whether the affirmed judgments fell within the specified language of § 12-22-72." Under appellees' argument, appellant-defendants such as appellant here are not "uncertain" whether the appeal penalty will be imposed in their cases as a matter of statutory construction; thus, appellant must, under some unwritten, unarticulated rule of the court below, raise its questions regarding § 12-22-72 on direct appeal.

Appellees' argument is seriously flawed in at least two respects. First, appellees do not draw this Court's attention to so much as a single line of one of those seventeen cases in which the court below suggests that it would itself draw such a distinction between the case at bar and those other seventeen cases. Thus, appellees' argument must fail because a state rule of presentation never before articulated by the highest court of a state can hardly comprise a state practice "strictly or regularly" followed so as to deprive this court of jurisdiction. *See NAACP* v. *Alabama*, 357 U.S. 449, 457 (1958).[3]

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[3] In *NAACP* v. *Alabama*, the State argued that the federal constitutional questions on which the NAACP sought review were required to be raised in a petition for writ of mandamus rather than by way of a petition for writ of certiorari as the

Appellees' argument is also refuted by *Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 248 So.2d 110 (1971). In *Steed*, a money judgment against the appellant was affirmed by the court below and the ten percent penalty was imposed. In an application for rehearing, the appellant in *Steed* did not contest the applicability of § 12-22-72 as a matter of statutory construction but, instead, challenged its imposition on other federal and state law grounds. Under appellees' argument to this Court, the appellant in *Steed* could not have raised any of these questions because none of them involved the interpretation of § 12-22-72. Thus, the case in the court below clearly on point[4] is

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NAACP had done. The Supreme Court of Alabama agreed with the State, but this Court refused to be bound by that holding, observing that the Alabama rule appeared to permit, but did not require, the NAACP to raise its constitutional questions in a mandamus action. 357 U.S., at 457.

The situation in this case is very similar to that in *NAACP* v. *Alabama*. Appellees correctly observe, Motion, at 7 & n.8, that appellant could have presented its federal constitutional challenge to § 12-22-72 on direct appeal; however, appellees, like the State of Alabama in the *NAACP* case, cannot point to a single case in the court below holding—or even suggesting—that presentation of such a challenge on direct appeal is the *exclusive* means by which a litigant can raise a federal constitutional challenge to § 12-22-72.

[4] Appellees, Motion, at 9, also attempt to distinguish *Central of Georgia Railway Co.* v. *Steed* by asserting that the *Steed* court "did not there address the federal constitutional issue raised on rehearing . . . ." This assertion is not supported by any language in the *Steed* court's opinion on rehearing. More importantly, the court below clearly reached the merits of at least one of the *Steed* appellant's federal constitutional questions raised for the first time on rehearing, namely, whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, preempted

flatly contrary to the argument which the appellees advance in this Court.[5]

II

Presentation of the Federal Constitutional Challenge to the Punitive Damage Awards

Appellees do not seriously join issue on the question of the practice of the court below as regards its power and disposition to consider issues raised for the first time on rehearing. Indeed, appellees cite, Motion, at 4, to only two cases in the court below to support their otherwise unsupported assertion that the court below "strictly or regularly" refuses to entertain new issues on rehearing. *Cooper* v. *State*, 226 Ala. 288, 147 So. 432 (1933); *State ex rel. Sigsbee* v. *City of Birmingham*, 160 Ala. 196, 48 So. 843 (1909). At the same time, appellees, Motion, at 10-14, concede that many cases cited by appellant are to the contrary.

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§ 12-22-72. Thus, *Steed* refutes appellees' argument that only questions involving the interpretation of § 12-22-72 can be raised on rehearing whether or not the court below decided the *Steed* appellant's Equal Protection Clause challenge to § 12-22-72.

[5] Appellees, Motion, at 5-6, incorrectly assert that *Lawrence* v. *Jones*, 37 Ala. 388 (1861), is inapposite. In *Lawrence*, the Supreme Court of Alabama imposed the ten percent penalty on the appellant. On certification of that judgment to the trial court, the appellee argued, contrary to existing Alabama precedent, that the penalty should be calculated based on the face amount of the judgment plus interest accrued on that judgment. The trial court and, on appeal, the Supreme Court of Alabama, ruled against the appellee on this issue of statutory construction. Thus, *Lawrence* is clear authority for the broader proposition that questions regarding the ten percent penalty statute do not necessarily even have to be raised in an application for rehearing but may be raised subsequently in the trial court.

In *Cooper v. State*, the applicant on rehearing had unsuccessfully challenged on direct appeal the constitutionality—under the Alabama constitution—of an Alabama statute. On rehearing, the applicant invoked a different provision of the Alabama constitution in challenging that statute; because the applicant's original state constitutional challenge to the statute had not been phrased in terms of a "general allegation of . . . unconstitutionality," the court below refused to consider it. *Id.*, at 293, 147 So., at 436.

Whatever *Cooper* stands for, it did not purport to overrule *Gibbons v. Gibbons*, 205 Ala. 636, 88 So. 833 (1921), in which the court below, in appellees' own words, Motion, at 13, "rejected the new theory" advanced on rehearing in support of the position the applicant had unsuccessfully asserted on direct appeal. Thus, at best, appellees have established that sometimes the court below will not consider a "new theory" on rehearing, whereas on other occasions, such as *Gibbons*, it will do so.

The only other case of the court below relied on by appellees is *State ex rel. Sigsbee* v. *City of Birmingham*, 160 Ala. 196, 48 So. 843 (1908). In that case, like *Cooper*, a constitutional issue had been raised and resolved against the applicant, who had been the appellant on direct appeal; on rehearing, which was decided February 5, 1909, the court below refused to consider additional constitutional questions raised by the applicant. Also illustrative of the practice of the court below, however, is that on April 16, 1909, the court below reached the merits and decided against the applicant on rehearing the question whether a specific Alabama statute not previously relied on by the applicant repealed, by implication, a

prior enacted Alabama statute. *State ex rel. Tubbs* v. *White*, 160 Ala. 168, 174, 49 So. 78, 81 (1909).

Appellees also appear to place some reliance on the cases in the court below in which the court, after enunciating a rule under which it would refrain from addressing questions raised for the first time on rehearing, nevertheless decides the "new" questions raised. This practice, which dates from at least 1893, *Robinson* v. *Allen*, 97 Ala. 596, 603, 12 So. 382, 604 (1893), must be assessed in the context of the view of the Supreme Court of Alabama that it is without power to issue advisory opinions. *See Opinion of the Justices No. 304*, 436 So.2d 832, 833 (Ala. 1983). Since the discussions of the merits of the newly raised questions in these cases cannot be regarded as advisory opinions, these cases lend additional support to appellant's position that the court below can and will hear newly raised issues on the merits on rehearing.

In *Kirkland* v. *Kirkland*, 281 Ala. 42, 198 So.2d 771 (1967), a case twice cited and relied on by appellees, Motion, at 3, 10, the applicant on rehearing, Dorsey Kirkland, raised for the first time the question whether he had a right "to enjoin [his brother, Robert Kirkland,] from placing [a] gate across that part of the boundary way which lies wholly on Dorsey's own land." 281 Ala., at 49, 198 So.2d, at 777. The court below, after stating that it would not "sanction" the practice of raising questions for the first time on rehearing, stated that its prior opinion had said nothing about Robert Kirkland's right to maintain the gate[6] and went on to state:

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[6] Appellees, Motion, at 10, misread *Kirkland* by stating that the court below "emphasized that its holding was *not* to be

> We will observe that, so far as we are advised, if Robert continues to obstruct Dorsey's use of his own land, Dorsey would be entitled to enjoin such obstruction.

It is difficult to conceive of language in which a question presented on rehearing could have been more clearly answered.

Finally, appellees, Motion, at 15, contend that the brief filed by appellant in support of its Application for Rehearing was "woefully inadequate," a conclusion apparently based on the appellees' demonstrably erroneous assertion, Motion, at 15-16, that the appellant's brief on rehearing "did not favor the Alabama Supreme Court with the citation of a single authority for the proposition that the awards in this case were unconstitutionally excessive." In its brief on rehearing, J.S. App., at 26a, appellant cited and relied on the Excessive Fines Clause and this Court's decision in *Trop* v. *Dulles*, 356 U.S. 86, 96 (1958), in support of its federal constitutional challenge to these punitive damage awards. Furthermore, appellees cannot even point to a rule of the court below suggesting

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understood as having decided the new question." Appellees' statement is apparently based on the following sentence in the opinion on rehearing: "Since the question was not considered, our decision is not to be understood as holding that [Kirkland] has the right to maintain the gate . . . ." However, this sentence in the court's opinion merely emphasized that it had not considered *in its original opinion* Robert Kirkland's right to maintain the gateway. The words "our decision" in the quoted sentence clearly refer to the opinion of the court on direct appeal, not to the court's decision on rehearing. The court proceeded, on rehearing, to decide the "new" question advanced by Dorsey Kirkland.

any possible merit to this argument, because the only rule applicable to applications for rehearing in that court and to briefs filed in support of applications for rehearing is Ala. R. App. P. 40, reproduced in the appendix hereto, which imposes no requirement even remotely analogous to the "woefully inadequate" standard invented by appellees in this Court. In addition, only one of the cases in the court below cited by appellees, Motion, at 16, in apparent support of this argument involved the failure of a party adequately to brief assignments of error in it brief on direct appeal. In that case, *Morgan* v. *Cherokee County Board of Education*, 257 Ala. 201, 204, 58 So.2d 134, 136 (1952), the appellant had, in its brief, "merely copie[d] the assignments of error without argument or citation of authority."[7]

It is not surprising that appellees found two cases in the court below which support its position that the Supreme Court of Alabama has occasionally declined to entertain questions raised for the first time on rehearing. Appellant, at the very least, has demonstrated that this alleged practice of the court below

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[7] This court considered and rejected a similar argument in *NAACP* v. *Alabama*, 377 U.S. 288, 294-99 (1964), after thoroughly reviewing the practice of the court below with respect to enforcement of its alleged rule regarding the adequacy of briefs filed on direct appeal. It is noteworthy that even that case was decided before Alabama abandoned its more technical rules of appellate practice and implemented the currently effective Rules of Appellate Procedure (adopted June 17, 1975). For example, in 1975 Alabama completely abandoned the concept of "assignments of error" on appeal, Ala. R. App. P. 20, and under Ala. R. App. P. 1, those rules "shall be construed so as to assure the just . . . determination of every appellate proceeding on its merits."

has not been "strictly or regularly" followed. Indeed, the two cases cited by appellees, read in light of the three dozen cases cited by appellant, show only that if there is any practice of the Supreme Court of Alabama which approaches the "strict or regular" standard, it is a practice which *does* permit new questions to be considered on rehearing. The actual practice of the court below is clear and cannot serve as an independent and adequate state ground to sustain the decision below.[8]

June 11, 1986

Respectfully submitted,

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[8] Appellees suggest, Motion, at 11, that some of the cases relied on by appellant may not be relevant because the questions raised for the first time and decided on rehearing are not federal constitutional questions. No case in the court below, however, is suggestive of such a distinction, and it is extremely doubtful that this Court would permit its jurisdiction to be preempted by the application of a state procedural rule which discriminated against the assertion of substantial federal rights in the fashion suggested by appellees.